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IN THE

Supreme Court of the United States

October Term, 1965

No. [redacted] 95

PETER BERATA and ANDREW RUTTO,

Petitioners,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable, The Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The petitioners, Peter Berata and Andrew Rutto, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered against them in the above-entitled case on March 30, 1965.

A. The Opinion Below

The opinion of the Court of Appeals in this case has not as yet been officially reported. It is set forth in Appendix A annexed to this petition.

B. Jurisdiction

The judgment of the Court of Appeals was entered on March 30, 1965. The jurisdiction of this Court is invoked under Rule 19 of the Supreme Court Rules and Title 28, United States Code, Section 1254(1), on the ground that review by the Supreme Court by writ of certiorari is sought of a judgment of affirmance on appeal by the United States Court of Appeals for the Second Circuit.

C. Questions Presented

The questions specifically raised by the petitioners, Peter Berata and Andrew Rutto, are:

I. Did the Government's failure to draw the Trial Court's attention to inconsistencies in Grand Jury testimony, and the Trial Court's failure to turn these minutes over to petitioners deprive petitioners of a fair trial?

II. Were the Trial Court's findings of fact and conclusions of law so clearly erroneous as to require a new trial?

D. Statutes

The statutes involved are:

Title 21, United States Code, Sections 173 and 174

The foregoing are set forth in Appendix B annexed to this petition.

E. Summary Statement of Matters Involved

Petitioners Rutto and Berata were named in three counts of a four count indictment, alleging sales of narcotics and a conspiracy to violate the narcotics laws. Named in all

counts was one Leroy Richardson, who is not a party to this petition. Petitioners were found guilty of two counts of sale, concealment and transportation of heroin, and one count of conspiracy to violate the narcotics laws. Petitioner Rutto was sentenced to a term of six years on each count of sale, concealment and transportation of heroin, and five years for conspiracy; the sentences to run concurrently. Petitioner Berata was sentenced to a term of seven years on each count of sale, concealment and transportation of heroin, and five years for conspiracy; the sentences to run concurrently. Petitioners are now serving the aforesaid terms of imprisonment. Their convictions were affirmed by the United States Court of Appeals for the Second Circuit.

F. Reasons for Granting Writ

I.

The Government's failure to draw the Trial Court's attention to inconsistencies in the Grand Jury minutes and the Trial Court's failure to turn these minutes over to petitioners deprived them of a fair trial.

On the day of the argument of this case in the Court of Appeals, petitioners learned for the first time that there were inconsistencies between the testimony of the Government's only witness before the Grand Jury, and his trial testimony. At the conclusion of argument, the Assistant United States Attorney advised the Circuit Court that there were inconsistencies as to dates.

The Government proffered the Grand Jury minutes of this witness' testimony to the Trial Court without drawing the inconsistencies to the attention of that Court and with-

out comment. The Trial Court stated that it found no inconsistency. The Government made no effort to correct the oversight. The Government owed to the Court and the petitioners a far greater degree of candor, in keeping with the accepted standards of fairness, than was shown here.

It is most certainly improper for the Government to withhold from the Trial Court its knowledge of inconsistencies between Trial testimony and Grand Jury testimony, while blandly handing Grand Jury minutes up to the Court without comment. The Government thus materially enhances its chances of gaining a conviction, while saving any arguments on the issue of materiality of the inconsistencies against a possible appeal.

The record of this case presents the question of suppression of exculpatory evidence.

> "We now hold that the suppression by the prosecution of evidence favorable to an accused upon a request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution . . ."
>
> *Brady* v. *Maryland*, 373 U.S. 83 (1963).

Certainly, disclosure of a prior sworn statement by a Government witness that he had made certain observations on dates other than those to which he testified at trial would have been "evidence favorable to the accused."

Such cavalier withholding of information and silence in the face of the Trial Court's error of fact, by the Government, call for this Court to exercise its supervisory powers.

II.

The Trial Court's erroneous findings of fact and conclusions of law deprived petitioners of a fair trial.

The findings of the Trial Court present what must, indeed, be a puzzle to this Court. The Court found that the petitioners were involved in a conspiracy with Richardson beginning in the middle of November, 1962, fully three weeks before the time of their first mention in the testimony (24A). Were this premature conspiracy not sufficiently prejudicial, the Trial Judge proceeded to an even more egregious finding; that petitioners had actual physical possession of contraband fully 23 days before the date set by the prosecution as their first alleged contact with this case (25A, 26A).

The findings and conclusions left the Court in such total confusion that, on sentence, the following transpired:

> "[The Court]: Therefore it is adjudged under Count 1 that the defendant Rutto be turned over to the custody of the Attorney General or his duly authorized representative for imprisonment, for a term of six years on Count 1—
>
> I think Count 1 did not involve Rutto; it involved only Berata, is that it?
>
> Mr. Gold: Count 1, your Honor, names only the defendant Leroy Richardson.
>
> "The Court: Oh, that is right" (12A).

It is obvious beyond peradventure that all of the above stated findings are clearly erroneous. It must be similarly clear that these erroneous findings prejudiced the petitioners beyond salvation. From the recitation of the Court's view of the evidence and its findings and conclusions (14A-

27A), the spilling over of testimony considered, and lack of compartmentalization by the Court led to a result which may not be permitted to stand. The record demonstrates that the Court found facts and made conclusions in a mechanical way with far less than the required degree of care.

The most comprehensive judicial treatment of the function and importance of findings of fact appears in *United States* v. *Forness*, 125 F. 2d 928, wherein Judge Frank stated at pages 942 and 943:

> "We stress this matter because of the grave importance of fact-finding. The correct finding, as near as may be, of the facts of a law suit is fully as important as the application of the correct legal rules to the facts as found. An impeccably 'right' legal rule applied to the 'wrong' facts yields a decision which is as faulty as one which results from the application of the 'wrong' legal rule to the 'right' facts. The latter type of error, indeed, can be corrected on appeal. But the former is not subject to such correction unless the appellant overcomes the heavy burden of showing that the findings of fact are 'clearly erroneous.' Chief Justice Hughes once remarked, 'An unscrupulous administrator might be tempted to say "Let me find the facts for the people of my country, and I care little who lays down the general principles."' That comment should be extended to include facts found without due care as well as unscrupulous fact-finding; for such lack of due care is less likely to reveal itself than lack of scruples, which, we trust, seldom exists. And Chief Justice Hughes' comment is just as applicable to the careless fact-finding of a judge as to that of an administrative officer. The judiciary properly holds administrative officers to high standards in the discharge of the fact-finding function. The judiciary should at least measure up to the same standards.

> It is sometimes said that the requirement that the trial judge file findings of fact is for the convenience of the upper courts. While it does serve that end, it has a far more important purpose—that of evoking care on the part of the trial judge in ascertaining the facts. For, as every judge knows, to set down in precise words the facts as he finds them is the best way to avoid carelessness in the discharge of that duty: Often a strong impression that, on the basis of the evidence, the facts are thus-and-so gives way when it comes to expressing that impression on paper. The trial court is the most important agency of the judicial branch of the government precisely because on it rests the responsibility of ascertaining the facts. When a federal trial judge sits without a jury, that responsibility is his. And it is not a light responsibility since, unless his findings are 'clearly erroneous,' no upper court may disturb them. To ascertain the facts is not a mechanical act. It is a difficult art, not a science. It involves skill and judgment. As fact-finding is a human undertaking, it can, of course, never be perfect and infallible. For that very reason every effort should be made to render it as adequate as it humanly can be."

Applying these requirements to the record in the Court below presents a picture which clearly demonstrates the prejudicial error which there occurred. The Court erroneously found that the petitioners had actual and constructive possession of contraband on November 13, 1962. This was neither alleged, nor was any testimony offered concerning such non-existent facts. With this fallacious finding firm in mind the Court proceeded to consider the charges against the petitioners. It is difficult to conceive of a more prejudicial set of circumstances in the process of adjudication than having the fact finder first convinced of an uncharged, un-

proven criminal act before considering the charges against a defendant.

> "If this case had been tried to a jury and the comments voiced by the learned trial judge had taken the form of jury instructions, a conviction obtained thereunder could not stand. . . .
>
> "It is a fundamental precept of the administration of justice in the federal courts that the accused must not only be guilty of the offense of which he is charged and convicted, but that he be tried and convicted according to proper legal procedures and standards. In short, it is not enough that the accused be guilty; our system demands that he be found guilty in the right way. Accordingly, it is no answer to the application of an erroneous standard of law that the evidence is sufficient to support a verdict reached in accordance with the proper standard of law. As the Supreme Court stated in a jury case in response to such a contention,
>
> 'It may not be amiss to remind that the question is not whether guilty be spelt out of a record, but whether guilt has been found by a jury according to the procedures and standards appropriate for criminal trials in the federal courts.'
>
> *Bollenback* v. *United States*, 362 U.S. 607."
>
> *Wilson* v. *United States*, 250 F. 2d 312 (9th Cir. 1958).

That petitioners were denied a fair trial by the erroneous findings of the Trial Court is clear.

CONCLUSION

For the reasons above set forth this petition for a writ of certiorari should be granted.

Respectfully submitted,

ALBERT J. KRIEGER,
Attorney for petitioners,
Peter Berata and Andrew Rutto.

ERNST H. ROSENBERGER,
Of Counsel.

APPENDIX A

Opinion of Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 406—September Term, 1964.

(Argued March 5, 1965 Decided March 30, 1965.)

Docket No. 28923

UNITED STATES OF AMERICA,

Appellee,

—v.—

PETER BERATA and ANDREW RUTTO,

Appellants.

Before:

MOORE, KAUFMAN and HAYS,

Circuit Judges.

Appeal from a judgment of conviction entered by the United States District Court for the Southern District of New York, John M. Cannella, *Judge,* for two violations of 21 U. S. C. §§173-74 (1958), and for conspiracy to violate those sections.

Affirmed.

ERNST H. ROSENBERGER, New York, N. Y., *for Appellants.*

OTTO G. OBERMAIER, Assistant United States Attorney, New York, N. Y. (Robert M. Morgenthau, United States Attorney for the Southern District of New York, Martin R. Gold, Assistant United States Attorney, on the brief), *for Appellee.*

Appendix A—Opinion of Court of Appeals

PER CURIAM:

Appellants Berata and Rutto and a co-defendant Richardson were tried by the district judge sitting without a jury for violating the federal narcotics laws, 21 U. S. C. §§173-4 (1958), and for conspiracy to violate those sections. The co-defendant Richardson was indicted and convicted on three substantive counts based on transactions with a government agent on November 13, December 6, and December 12, 1962. The appellants were indicted and convicted on the conspiracy count and only two substantive counts based on the two later transactions. However, in his findings of fact the trial judge held that on all three occasions Rutto "aided and abetted in the sale and had actual possession and concealed and facilitated the transportation of heroin" and Berata "aided and abetted in the sale and had constructive possession of the heroin in that he exercised dominion over it, and a certain amount of control." The appellants contend that this finding is clearly erroneous and unsupported in the evidence as to the transaction which took place on November 13, and that this assertedly erroneous finding prejudiced the trial court's consideration of all three counts upon which appellants were convicted.

The government urges that the trial judge could properly have drawn the inference that Berata and Rutto aided, or participated in, the November 12 transaction from the character of the two later transactions and from conversations between Berata and Rutto which were overheard by a Government agent. We need not rule on this point since the finding was at most mere surplusage. The conviction on the two substantive counts was supported by

actual eyewitness testimony of several agents. The evidence was more than sufficient for conviction.

On defendants' request for inspection of the grand jury minutes the judge examined them and denied the request, announcing that he found no inconsistency.

The appellants quarrel with the failure of the trial judge to reexamine the minutes to ascertain whether the testimony of other agents who testified later in the trial was inconsistent with hearsay testimony as to their observations given by agent Holborow who was the only witness before the grand jury. (See *United States* v. *Borelli*, 336 F. 2d 376, 390-92 (2d Cir. 1964), cert. denied sub nom. *Cinquegrano* v. *United States*, —— U. S. —— (1965).) In the absence of any request by the defendants for a second examination of the minutes we hold that there was no reversible error.

We have ourselves examined the minutes and while there are several minor inconsistencies and the judge would have been justified in allowing the defendants to inspect the minutes, we do not find that his refusal to do so was an abuse of discretion.

Affirmed.

APPENDIX B

Statutes Involved

UNITED STATES CODE, TITLE 21

Section 173. Importation of narcotic drugs prohibited; exceptions; crude opium for manufacture of heroin; forfeitures

It is unlawful to import or bring any narcotic drug into the United States or any territory under its control or jurisdiction; except that such amounts of crude opium and coca leaves as the Commissioner of Narcotics finds to be necessary to provide for medical and legitimate uses only may be imported and brought into the United States or such territory under such regulations as the Commissioner of Narcotics shall prescribe, but no crude opium may be imported or brought in for the purpose of manufacturing heroin. All narcotic drugs imported under such regulations shall be subject to the duties which are now or may hereafter be imposed upon such drugs when imported.

Any narcotic drug imported or brought into the United States or any territory under its control or jurisdiction, contrary to law, shall (1) if smoking opium or opium prepared for smoking, be seized and summarily forfeited to the United States Government without the necessity of instituting forfeiture proceedings of any character; or (2), if any other narcotic drug be seized and forfeited to the United States Government, without regard to its value, in the manner provided by sections 514 and 515 of

Title 19, or the provisions of law hereafter enacted which are amendatory of, or in substitution for, such sections. Any narcotic drug which is forfeited in a proceeding for condemnation or not claimed under such sections, or which is summarily forfeited as provided in this subdivision, shall be placed in the custody of the Commissioner of Narcotics and in his discretion be destroyed or delivered to some agency of the United States Government for use for medical or scientific purposes. Feb. 9, 1909, c. 100, Sec. 2(b), (d), 35 Stat. 614; Jan. 17, 1914, c. 9, 38 Stat. 275; May 26, 1922, c. 202, Sec. 1, 42 Stat. 596; June 7, 1924, c. 352, 43 Stat. 657; June 14, 1930, c. 488, Sec. 3, 46 Stat. 586.

UNITED STATES CODE, TITLE 21

Section 174. Same; penalty; evidence

Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned not less than five or more than twenty years, and in addition, may be fined not more than $20,000. For a second or subsequent offense

(as determined under section 7237(c) of the Internal Revenue Code of 1954), the offender shall be imprisoned not less than ten or more than forty years and, in addition, may be fined not more than $20,000.

Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.

For provision relating to sentencing, probation, etc., see section 7237(d) of the Internal Revenue Code of 1954. Feb. 9, 1909, c. 100, Sec. 2(c), (f), 35 Stat. 614; Jan. 17, 1914, c. 9, 38 Stat. 275; May 26, 1922, c. 202, Sec. 1, 42 Stat. 596; June 7, 1924, c. 352, 43 Stat. 657; Nov. 2, 1951, c. 666, Secs. 1, 5(1), 65 Stat. 767; July 18, 1956, c. 629, Title I, Sec. 105, 70 Stat. 570.

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 1116

PETER BERATA AND ANDREW RUTTO, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (R. II, 79a; Pet. App. 1a-3a) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on March 30, 1965. A petition for rehearing was denied on April 14, 1965. The petition for a writ of certiorari was filed on April 30, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioners were deprived of a fair trial because government counsel delivered grand jury testimony of a witness to the trial court without commenting on minor inconsistencies.

2. Whether the trial court's findings of fact were erroneous.

STATEMENT

Petitioners were convicted by the court, sitting without a jury, in the Southern District of New York on two substantive counts and a conspiracy count charging violation of the narcotics laws, 21 U.S.C. 173 and 174 (R. I, 7a-10a, 27a). Petitioner Berata was sentenced to imprisonment for concurrent periods of seven years on each of the two substantive counts and five years on the conspiracy count (R. I, 30a-31a). Petitioner Rutto was sentenced to imprisonment for a period of six years on each substantive count and five years on the conspiracy count, to run concurrently (R. I, 28a-29a). The court of appeals affirmed the judgment *per curiam* (R. II, 79a).

The evidence showed that on November 7, 1962, an informant introduced narcotics agent Cantu to co-defendant Richardson at Richardson's TV repair shop (R. II, 3a, 22a). Richardson asked Cantu if he wanted "some of the stuff" and stated that he could get him a "piece" for $475 (R. II, 4a). On November 8, 1962, Cantu gave Richardson $475 (R. II, 6a) which Richardson returned the next day, tell-

ing Cantu he was unable to see his connection (R. II, 7a-8a). On November 13, 1962 agent Cantu again gave Richardson $475 to get "one piece of stuff" (R. II, 9a). Richardson made delivery later that day (R. II, 10a-11a).

Subsequently, on December 6, 1962, agent Cantu gave Richardson $490 for another ounce of heroin (R. II, 13a). Richardson was seen going to the C & A Paint Shop, where he talked with petitioner Rutto, gave Rutto some money and received in return a brown paper bag (R. II, 25a). Richardson then left the paint shop and delivered a brown paper bag containing heroin to agent Cantu (R. II, 14a-15a, 33a-34a). About 7:00 p.m. petitioner Rutto met petitioner Berata in a bar several blocks from the C & A Paint Shop (R. II, 26a-27a, 36a-37a), and they engaged in the following conversation (R. II, 37a):

> Mr. Berata asked Rutto, "How did everything go?" Mr. Rutto said, "Everything went down all right. The guy got the piece and he liked the goods. He gave me the four bills * * *. Can you imagine he tried to chisel me down. He told me he only makes $90 on each piece."
>
> Mr. Berata then said "This guy gets no more goods unless he takes five or better at a time. If he takes five or more we will let him have it for $350 a piece."

Petitioner Rutto then gave Berata a sum of money (R. II, 37a).

On December 12, 1962 agent Cantu gave Richardson $980 for two more ounces of "stuff" (R. II, 17a-18a). Thereafter, in response to a radio call (R. II,

38a), narcotics agents kept the C & A Paint Shop under surveillance and followed petitioner Rutto along a circuitous route to a meeting with Richardson (R. II, 30a-31a, 38a-39a). At this meeting, Richardson alighted from his vehicle, walked across the street to Rutto, who was sitting in the car, put his head, shoulders and hands inside the driver's side for about 30 seconds and then walked directly back to his automobile (R. II, 31a, 39a). Richardson, after making a telephone call, met agent Cantu in front of the TV shop and delivered a brown paper sack containing heroin (R. II, 18a-19a, 31a-32a). In the meantime, Rutto returned to the bar in the vicinity of the paint shop, where he met Berata and had the following conversation (R. II, 39a-40a):

> Berata asked Rutto again, "How did everything go?"
>
> Rutto said, "I don't know. There was a little —I had someone—I think I had someone follow me. I have noticed cars sitting around the paint store yesterday, and I thought some cars were following me today, but I tried to shake them * * * but I gave the guy the two pieces and I got the nine bills."

On January 7, 1963, agent Cantu told Richardson he wanted 18 ounces of stuff (R. II, 19a-20a). Richardson made a telephone call, asked for "Shorty" and said "he needed 18 cans of paint" (R. II, 20a). After the telephone call Richardson told agent Cantu to come back later. The next day, Richardson told Cantu that "there was something going wrong" and that

he would not be able to help him any more (R. II, 21a).

ARGUMENT

1. Petitioners contend in this Court (as they did on petition for rehearing in the court of appeals) that government counsel acted improperly in failing to call to the attention of the trial court inconsistencies between grand jury and trial testimony of a witness (Pet. 3-4). This contention is without merit. The record shows that counsel gave the grand jury testimony of agent Holborow to the court, which was sitting as both judge and jury, and stipulated that this witness was the only prosecution witness to testify before the grand jury (R. I, 11a). At the close of the testimony by agent Holborow, the court stated (R. I, 11a):

> I have read the grand jury testimony and I have also followed it during the course of the examination and I find no material variance in it. I think it has a lot of hearsay, but no material variance. I direct that it be returned to the district attorney.

Two leading questions in the grand jury minutes referred to the date of December 5, 1962 instead of December 6, 1962, and agent Holborow answered "yes sir" to both. At trial, agent Holborow was one of at least five narcotics agents who testified about their roles in observing the events of December 6 and 12. The testimony of all five agents as to dates was consistent. Since the court had read the grand jury

testimony and had followed it during Holborow's examination, government counsel had no reason to believe that the court's finding of "no material variance" was, in fact, a finding that there were no inconsistencies whatever or that no "oversight" had occurred. This case falls far short of the "suppression by the prosecution of evidence favorable to an accused" which is "material either to guilt or to punishment" contemplated in *Brady* v. *Maryland*, 373 U.S. 83, 87, on which petitioners rely.

2. Petitioners further assert that the trial court erroneously found that they were involved in a conspiracy with Richardson beginning in the middle of November 1962, and that Rutto had actual possession and Berata had constructive possession of narcotics as far back as the November 13 transaction between Richardson and agent Cantu (Pet. 5-8). While the testimony did not specifically link petitioners to the operation until December 6, 1962, the pattern or scheme of the transactions occurring in December made it reasonable for the trial court to conclude that petitioners provided the same service for Richardson on November 13, 1962. The assertion that the trial court was confused about the evidence is refuted by the record. Prior to its findings of fact, the court stated in a clear and detailed manner an accurate summary of all the evidence (R. I, 13a-23a). The findings, while perhaps broader than was necessary for decision, have not been shown to be erroneous.

In any event, the findings of fact as to the December 6 and 12 transactions (the two substantive counts) was supported by actual eyewitness testi-

mony of several narcotics agents. The court of appeals treated the findings regarding the November transaction as "at most mere surplusage," and it correctly held that the evidence was sufficient for conviction. (Pet. App. 2a-3a).

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.

FRED M. VINSON, JR.,
Assistant Attorney General.

BEATRICE ROSENBERG,
PAUL C. SUMMITT,
Attorneys.

JUNE 1965

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